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The Constitutional Aspects of Restricting Business Closures

In the summer of 1982, California Assemblywoman Maxine Waters proposed a controversial bill called the Employment Stabilization Act¹ (hereinafter E.S.A.) that, if passed, would have greatly reduced the freedom of large businesses to relocate or shutdown.² The E.S.A. responds strongly to the increasing number of business closures in California by requiring large businesses before reducing their operations to give twelve months notice to their employees,³ to offer a choice to the workers of severance pay⁴ or a transfer to another California workplace without loss of benefits accrued over the employees' years of labor,⁵ and to pay a fee⁶ and turn over financial records⁷ to the Department of Industrial Relations (hereinafter referred to as the D.I.R.) for its use in developing alternatives to closing and options for the displaced workers. Proponents of the E.S.A. believe that the social problems caused by business dislocations should be addressed by the businesses responsible for the layoffs.⁸ One consequence of the increased responsibility for displaced workers is the discouragement of business mobility, thus preventing the problems caused by plant closures from occurring in addition to providing relief after the fact.⁹

1. A.B.2839, Cal. Leg., Reg. Sess., 1981-82 (as amended in Assembly May 28, 1982) (attempt to add part 5 to Division 2 of the California Labor Code beginning with section 1450) [hereinafter referred to as A.B. 2839 and Labor Code section sought to be added].

2. See Arnold, *Existing and Proposed Regulation of Business Dislocations*, 57 U. DET. J. URB. L. 209,234 (1980). The E.S.A. did not survive in the Assembly this year. Nevertheless, since the California legislature is likely to confront a similar bill in the future, see *infra* notes 28-32 and accompanying text, and since the Comment is using the E.S.A. as a hypothetical to examine the constitutionality of this sort of legislation, *id.*, the E.S.A. will generally be referred to as if presently enacted in order to facilitate the discussion. Occasionally, sections will be footnoted to remind the reader that the author is aware that the E.S.A. is not the law.

3. See *infra* notes 38-48 and accompanying text.

4. See *infra* notes 55-56 and accompanying text.

5. See *infra* notes 57-59 and accompanying text.

6. See *infra* note 54 and accompanying text.

7. See *infra* note 53 and accompanying text.

8. See *infra* notes 252-254 and accompanying text.

9. See *infra* notes 123-127 and accompanying text.

This inhibitory result of the E.S.A. raises several interesting issues such as: the economic ramifications of placing the social costs of business dislocation on the businesses responsible for those costs;¹⁰ the question of whether corporations should be forced to operate in the best interests of the workers and their communities when to do so would conflict with the interests of corporate shareholders; and the relative merit of the E.S.A. when compared with European and Japanese industry standards for dealing with business mobility.¹¹ A more fundamental consideration, however, is whether a state may take measures similar to those proposed in the E.S.A. to regulate business movement without contravening the United States Constitution. Arguments have been made that restrictions similar to those imposed by the E.S.A. offend the Commerce Clause,¹² the Contract Clause,¹³ and the Taking Clause.¹⁴ Should any of these arguments prove to be insurmountable, the potential social benefit of legislation like the E.S.A. would become irrelevant. This comment will demonstrate that the Commerce Clause, Contract Clause, and Taking Clause obstacles can be cleared by the type of legislation exemplified by the E.S.A.

The initial constitutional hurdle, the Commerce Clause, will be overcome by first showing that the E.S.A. does not discriminate against interstate commerce.¹⁵ Then, the Commerce Clause balancing test will be shown to weigh in favor of the strong local interests promoted by the E.S.A.'s restrictions¹⁶ since the E.S.A. burdens California enterprises more than out-of-state enterprises,¹⁷ a factor reducing the level of judicial scrutiny.¹⁸ A different theoretical approach to the Commerce Clause issue indicating that the Commerce Clause should not apply to legislation like the E.S.A. will conclude this constitutional section.¹⁹

To rebut the Contract Clause argument, the E.S.A. will be distinguished from the legislation invalidated in the central Contract Clause case, *Allied Structural Steel v. Spannaus*.²⁰ The distinctions should allow the E.S.A. to avoid the close scrutiny applied by the United States

10. See Sacramento Bee, Aug. 5, 1982, at 5, cols. 1-2.

11. See generally, Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1458-59 (1970) (on the differing historical development of countries leading to different methods of regulating business).

12. Arnold, *supra* note 2, at 251-53.

13. *Id.* at 242-45.

14. *Id.* at 247-51. Possible Equal Protection arguments will not be discussed because the rational relationship test for economic legislation is easily overcome. See *id.* at 245-47.

15. See *infra* notes 67-83 and accompanying text.

16. See *infra* notes 101-120 and accompanying text.

17. See *infra* notes 67-74 and accompanying text.

18. See *infra* notes 116-117 and accompanying text.

19. See *infra* notes 128-134 and accompanying text.

20. 438 U.S. 234 (1978).

Supreme Court in *Allied*.²¹ In addition, the minority approach, which opposes application of the Contract Clause to regulations like the E.S.A., will be analyzed because the recent change in the composition of the United States Supreme Court renders suspect the continuing vitality of the *Allied* majority approach.²²

Finally, the Taking Clause objection will be answered by demonstrating that the notice requirement is not a taking as this term is currently understood by the Supreme Court.²³ The ultimate question in determining whether or not a taking has occurred is on whom should the cost of regulations fall?²⁴ This comment will show that for legislation like the E.S.A., the cost should be borne by large businesses that aggravate the problems that layoffs cause by refusing to take any responsibility for their former employees.²⁵ Furthermore, a statutory modification will be proposed to protect the interests of the employees without unduly interfering with the interests of management, thus avoiding the taking issue altogether.²⁶

By answering the constitutional questions, this comment strives to pave the way for others to analyse the desirability of restraining management's ability to reduce business operations regardless of employees' need to hold on to their jobs during the current period of high unemployment.²⁷ The E.S.A. will be used for the constitutional analysis because the E.S.A.'s provisions clearly invite scrutiny under the Commerce Clause, Contract Clause, and Taking Clause.²⁸ The E.S.A. resembles bills that have been proposed in other states attempting to bring about similar business regulations;²⁹ therefore, the E.S.A. serves as a concrete example of its legislative genre. Although this type of legislation has been passed only in Maine,³⁰ the number of proposals in other states³¹ and the fact that an earlier version of the bill was proposed in California³² indicate that debate over restricting business movement will continue in future legislative sessions. To sharpen the focus of the constitutional arguments, the restrictions of the E.S.A. must be more fully illuminated.

21. See *infra* notes 145-201 and accompanying text.

22. See *infra* notes 203-213 and accompanying text.

23. See *infra* notes 225-256 and accompanying text.

24. See *infra* note 239 and accompanying text.

25. See *infra* notes 251-255 and accompanying text.

26. See *infra* notes 257-265 and accompanying text.

27. Sacramento Bee, Aug. 7, 1982, at 1, cols. 5-6.

28. See Arnold, *supra* note 2, at 242-45, 247-53.

29. See *id.* at 229-34.

30. ME. REV. STAT. ANN. tit.26, §625-B.

31. See Arnold, *supra* note 2, at 229-34.

32. See S.B. 1494, Cal. Leg., Reg. Sess., 1979-80; S.B. 1114, Cal. Leg., Reg. Sess., 1980-81.

THE PROVISIONS OF THE E.S.A.

The E.S.A. applies to large nonexempted California businesses³³ that significantly reduce their operations.³⁴ The terms of any lawful collective bargaining agreement prevail should they conflict with any part of the E.S.A.³⁵ Accordingly, the E.S.A. has a broad impact since its provisions apply to most large private businesses without a union agreement covering plant closures.³⁶ In addition, a possible side effect of the E.S.A. is to give unions greater bargaining leverage on the issue of receiving benefits in the event of a shutdown because the alternative to reaching a voluntary agreement would have been compliance with the terms of the E.S.A.³⁷

The specific requirements of the E.S.A. are as follows. For any covered businesses to reduce their operations over the permitted amount, notice must be given twelve months in advance.³⁸ The notice must go to all of the employees at the affected workplace,³⁹ the labor organization, if any, representing those employees,⁴⁰ the elected officials of the community where the reduction of operations will occur,⁴¹ and the D.I.R.⁴² The notice must contain specific references identifying the workplace to be closed,⁴³ reasons for the closure,⁴⁴ an estimate of the length of the closure,⁴⁵ the number of employees to be laid off,⁴⁶ and a description of all employee rights and benefits under the terms of any existing collective bargaining agreements or company personnel policies.⁴⁷ The penalty for failure to provide adequate notice under the E.S.A. is a maximum of \$10,000 per affected employee;⁴⁸ however,

33. The E.S.A. covers businesses employing an average of 300 employees during the preceding twelve months, A.B. 2839, *supra* note 1, §1452(c), or other employers with an average of 2,000 employees nationwide, and 50 at a single plant in California, during the previous year. *Id.* The E.S.A. exempted businesses closed due to labor disputes, *id.* §1453(a), the seasonal or temporary nature of the job, *id.* §1453(d), or the job site, *id.* §1453(c), bankruptcy, *id.* §1453(e), and any businesses run by the state or local government. *Id.* §1453(b).

34. A reduction in operations of 15 workers or 25 percent of the workforce, whichever is greater, triggered the E.S.A. *Id.* §1452(f).

35. *Id.* §1464(f).

36. *See id.* That most unions have not exacted an agreement concerning plant closures can be inferred from the vociferous union support of the E.S.A. *See* Sacramento Bee, Aug. 5, 1982, at 5, cols. 1-2. *See supra* note 2 for a discussion of the status of the E.S.A.

37. *See* A.B. 2839, *supra* note 1, §1464(f).

38. *Id.* §1460(b).

39. *Id.* §1460(a)(1).

40. *Id.* §1460(a)(2).

41. *Id.* §1460(a)(3).

42. *Id.* §1460(a)(4).

43. *Id.* §1460(c)(1).

44. *Id.* §1460(c)(2).

45. *Id.* §1460(c)(3).

46. *Id.* §1460(c)(4).

47. *Id.* §1460(c)(5).

48. *Id.* §1471(a).

there is an exception for unplanned reductions in operations.⁴⁹ Where a layoff becomes a reduction of operations as defined by the E.S.A., or if any other unforeseen event causes a reduction of operations, notice must be provided not later than ten days after the reduction in operations begins.⁵⁰ Failure to notify the correct parties on time in accordance with this exception may result in a fine of up to \$1,000 per affected employee.⁵¹

After the businesses comply with the notice requirement, the E.S.A. mandates that they make a good faith offer to sell at fair market value any plant closing completely or relocating.⁵² Also, operating and financial records relating to the affected work sites of the businesses must be disclosed to the D.I.R. for use in its investigative and planning activities.⁵³ The E.S.A. requires closing businesses to pay the D.I.R. a fee to defray the costs incurred by that body in fulfilling its obligations under the E.S.A.⁵⁴

A more significant expense than the payment of the fee to the D.I.R. is the choice between two severance benefit plans that the E.S.A. forces businesses to offer to their displaced employees.⁵⁵ Of the two plans, the one demanding severance pay equal to the wages for one work week for each completed year of service before the reduction in operations plus a bonus of the same amount for every five years of employment probably costs businesses more money.⁵⁶ The alternative method provides for permanent preference rights in hiring and employment at the employer's other California business operations with no loss of previously earned health, welfare, pension, and vacation benefits.⁵⁷ Although this alternative costs more than beginning with workers to whom no benefits have accrued, it merely continues previous commitments to employees rather than imposing new obligations. The preference rights in hiring and continued benefits, however, are accompanied by a section which does impose new obligations in the form of a reloca-

49. *Id.* §1460(d).

50. *Id.*

51. *Id.* §1471(b).

52. *Id.* §1463(b). The offer must be made to the surrounding community and the displaced workers, and must be held open for 50 days. *Id.*

53. *Id.* §1463(a).

54. The fee is \$1,500. *Id.* §1461. The D.I.R.'s responsibilities include studying the viability of a community owned business, *id.* §1462(d)(2), investigating possible avenues available to the plant to avoid closing, *id.* §1462(b)(1), convening a meeting of community political and financial leaders with the representatives of the plant and the workers in order to plan a way to reduce the unemployment caused by the reduction in operations, *id.* §1462(c)(1), (2), and preparing a statement detailing the predicted economic and social impact of the closure. *Id.* §1462(d)(3).

55. *Id.* §1464(a), (b).

56. *Id.* §1464(b). A week's pay is measured by 40 hours straight time at the employee's regular wage rate. *Id.* The employer must pay every affected worker a minimum of three weeks' wages computed in this manner. *Id.*

57. *Id.* §1464(a).

tion fee.⁵⁸ The relocation fee still should do less violence to company coffers in most cases than the severance pay because under the former, the employer must pay a *maximum* of \$500 to each worker who accepts a transfer to a new site that is more than forty miles from his home.⁵⁹

Another company expense arises from the requirement of the E.S.A. that the employers continue paying their share of premiums on all employee health and insurance benefit plans in existence before the reduction in business operations.⁶⁰ The payments must continue for a year unless the worker finds new health and insurance benefits through other employment prior to the expiration of the twelve month period.⁶¹ The combined effect of these statutorily imposed expenses will prompt management to avoid business shutdowns or relocations if there is a less costly alternative.⁶² As demonstrated above, the requirements of the E.S.A. are many and burdensome, but it does not inexorably follow that they are unconstitutional. The discussion of the constitutionality of the E.S.A. will begin with the Commerce Clause.

THE EMPLOYMENT STABILIZATION ACT AND THE COMMERCE CLAUSE

The portions of the E.S.A. raising Commerce Clause issues are those which curtail the option of businesses to relocate. More specifically, the requirement of twelve months notice on penalty of a heavy fine,⁶³ and the option of severance pay for all displaced workers⁶⁴ or preference in hiring with no loss of earned benefits at a new location,⁶⁵ impede decisions to relocate because of the time restraints of the former and the cost of the latter. In some cases, the notice requirement could prove costly as well because a good deal of information is demanded for a potentially large number of people.⁶⁶ The costs and delays placed on California businesses lead to a fundamental Commerce Clause inquiry, that is, is the E.S.A. a protectionist measure and therefore invalid?

58. *Id.* §1464(c).

59. *Id.* The \$500 or less compensates the employee for the movement of household goods, transportation to the new location for the employee and any dependents, and fees and costs associated with obtaining a new residence. *Id.*

60. *Id.* §1464(e).

61. *Id.*

62. See Arnold, *supra* note 2, at 234.

63. See *supra* notes 38-48 and accompanying text.

64. See *supra* notes 55-56 and accompanying text.

65. See *supra* notes 57-59 and accompanying text.

66. See *supra* notes 38-48 and accompanying text.

A. The Employment Stabilization Act Is Not a Protectionist Measure as Protectionism Is Interpreted by the Supreme Court

The Supreme Court, acting as a champion of free trade,⁶⁷ traditionally has opposed protectionist measures that isolate the trade of a state from the rest of the union.⁶⁸ The protectionism inherent in the E.S.A., however, differs from that typically found to be invalid.⁶⁹ The E.S.A. does not impede the flow of goods to and from the state⁷⁰ or prevent non-California industries from sharing equal access to the California market;⁷¹ rather, the E.S.A. gives California workers preferred rights to their jobs over any new employees, without prohibiting a change in the work force by the company. This preference does not erect a barrier to trade or discriminate by burdening out-of-state industry without also burdening industry within the state;⁷² instead, it places the burden of helping California employees on local businesses.⁷³ The former practices have consistently been found to be inimical to free trade and therefore protectionist and invalid,⁷⁴ but this is not true of restrictions placed exclusively on local enterprises.⁷⁵

The only anticompetitive effect of the E.S.A. outside of California is the loss to other states of speculative benefits due to the inhibition of movement caused by the increased expense.⁷⁶ The benefit is speculative because it depends upon the economic condition of a business when it relocates. Even if a highly successful business were to move, the benefit would not be inevitable because a proclivity by management for reaping short term profits could lead to swift changes in location and production needs, thus causing the same problems elsewhere that the E.S.A. purports to remedy. The benefit to other states surely must be considered minimal when contrasted with the certain harm caused to California by a business dislocation without this type of worker protection. The E.S.A. inhibits competition only for existing

67. See *Eule, Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425, 428 (1982).

68. See *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935); *Hood & Sons v. DuMond*, 336 U.S. 525, 539 (1949); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

69. *E.g.*, note 68 *supra*.

70. For an example of a case when impeding the flow of goods from state to state was not tolerated, see *Hood*, 336 U.S. at 539.

71. For an example of a case where denying equal access to a state market was not tolerated, see *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977).

72. See generally A.B.2839, *supra* note 1. Opponents of the E.S.A. contend that the problem with the E.S.A. is that it burdens California businesses excessively to the advantage of out-of-state competition. See *Sacramento Bee*, Aug. 5, 1982, at 5, cols. 1-2.

73. See *id.*

74. See *Hunt*, 432 U.S. at 351; *Raymond Motor Transportation, Inc. v. Rice* 434 U.S. 429, 447 (1978); *City of Philadelphia* 437 U.S. at 626-27; *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 42 (1980).

75. See, *e.g.*, note 74 *supra* (in none of these cases was burdening local businesses a factor).

76. But see *Arnold, supra* note 2, at 253.

California businesses,⁷⁷ and does not prevent successful companies from starting new branches elsewhere. In addition, critics of the E.S.A. contend that California will be disadvantaged in the competition for new businesses,⁷⁸ so the effect on the economies of other states should not be severe.

Moreover, the commercial interests of other states are not greatly infringed upon by the E.S.A.'s protection of California workers. While the goal of protecting local workers has been rejected before as a justification for legislation challenged by the Commerce Clause,⁷⁹ the reason for the rejection centered on the means employed by the state schemes, rather than the illegitimacy of the state goal protecting the local work force.⁸⁰ In *Baldwin v. Seelig*,⁸¹ the Court refused to countenance the argument made by New York that regulations to prevent the destruction of industry by outside competition were a health measure.⁸² Although recognizing that there is no health if workers are starving, the Court thought that using this excuse to prevent competition would lead to reprisals by other states culminating in protective tariffs, the stifling of trade, and the "speedy end of our national solidarity."⁸³ By its terms and in effect, the E.S.A. does not inhibit the businesses of other states from competing in California. As will be shown in the following section, the E.S.A. poses little threat to national solidarity by inducing competition among the state legislatures seeking to tie down local businesses, and is a suitable subject for state legislation.

B. States Are Appropriate Bodies to Form this Type of Legislation

As a preliminary matter, the Commerce Clause, by its own weight, will not preempt this type of act because the Clause rarely preempts any field, and then only when the lack of uniformity would hinder the flow of interstate goods.⁸⁴ Nonetheless, it has been suggested that the state is not the appropriate body to create an act regulating business in this way because only national legislation can accommodate the different interests involved.⁸⁵ The point is well taken that responses to these business restrictions will vary among the states due to the differences in local conditions. Since large markets like California attract business,⁸⁶

77. See A.B.2839, *supra* note 1, §1452(c).

78. See *Sacramento Bee*, Aug. 5, 1982, at 5, cols. 1-2.

79. See, e.g., *City of Philadelphia*, 437 U.S. at 627.

80. See, e.g., *id.* at 626-27.

81. 294 U.S. 511 (1935).

82. *Id.* at 523.

83. *Id.*

84. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978).

85. See *Arnold*, *supra* note 2, at 254.

86. See *Range, Playboy Interview: Akio Morita*, *PLAYBOY*, Aug., 1982, 69, 78.

the imposition of measures increasing the difficulty of extracting businesses from the market area is not likely to completely discourage business from coming to California. States with less attractive markets, however, face the prospect of alienating businesses that do not have to be there by passing legislation like the E.S.A. Therefore, the need to adapt regulations of this sort to conditions peculiar to the states indicates that they can best judge the extent of control over business necessary to improve local conditions.

Because the E.S.A. does not discriminate against out-of-state competition on its face or in effect,⁸⁷ other states will not be inclined to retaliate with more restrictive legislation, thus causing economic stagnation.⁸⁸ In fact, since opponents perceive the E.S.A. as discouraging businesses from locating in California,⁸⁹ neighboring states may refrain from following suit in order to capture timid management shying away from the restrictions. Even if every state has this kind of statute, business might not stagnate⁹⁰ because the uniformity of the burden of responsibility toward workers would place no group of companies at a disadvantage. A detailed examination of the economic impact upon the nation of one or more states adopting the E.S.A. is beyond the scope of this comment, but from the foregoing discussion there does not appear to be a grave threat to national solidarity⁹¹ no matter how many states eventually regulate business mobility. Since the E.S.A. would not be preempted,⁹² is appropriate for state legislation,⁹³ and is not of a protectionist character,⁹⁴ the next section will discuss the remaining issues of whether the putative benefits of the E.S.A. outweigh its burden on interstate commerce, and whether a less restrictive alternative might accomplish the same objective.

C. *The Commerce Clause Balancing Test Applied to the Employment Stabilization Act*

State regulations that act evenhandedly to alleviate legitimate local problems, and cause only an incidental effect on interstate commerce,

87. The E.S.A. does not concern the flow of goods, but only burdens the movement of large businesses located in California; thus, it raises the business costs for California enterprises. This may potentially benefit competitors from other states who do not have this expense. While the E.S.A. inhibits the ability of other states or countries to lure businesses away from California, businesses have no better prospect for significant in state movement. *See supra* notes 67-78 and accompanying text.

88. *See Arnold, supra* note 2, at 234.

89. *See Sacramento Bee*, Aug. 5, 1982, at 5, cols. 1-2.

90. *But see Arnold, supra* note 2, at 234.

91. *Baldwin*, 294 U.S. at 523.

92. *See supra* note 84 and accompanying text.

93. *See supra* notes 85-91 and accompanying text.

94. *See supra* notes 67-83 and accompanying text.

will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative social benefits."⁹⁵ A recent United States Supreme Court decision, *Minnesota v. Clover Leaf Creamery Co.*,⁹⁶ indicated an increasing willingness on the part of the Court to uphold burdensome statutes that pass the "crucial inquiry" into whether they are protectionist measures.⁹⁷ In *Clover Leaf*, the Court upheld a statute that banned the retail sale of milk in plastic nonreturnable, nonrefillable containers, but that allowed the sale of milk in paperboard nonreturnable, nonrefillable containers.⁹⁸ The Minnesota Legislature intended to promote the use of recyclable packaging, to reduce energy waste and solid waste management problems, and to slow down the depletion of natural resources.⁹⁹ The Minnesota District Court had held that the statute violated the Commerce Clause; however, the state Supreme Court found no rational relation between the statute and its avowed purpose, and struck it down on Equal Protection grounds.¹⁰⁰ The case was then appealed to the United States Supreme Court.

After disposing of the Equal Protection argument by finding a rational relationship between the statute and its goal, the Court considered the Commerce Clause argument used by the Minnesota District Court, focusing on the relation of the burden on interstate commerce to the local benefits.¹⁰¹ The fact that the Minnesota statute applied to all milk producers, without exceptions for local dairies, satisfied the inquiry into discrimination.¹⁰² The Court found that commerce was not seriously burdened by the statute because milk products would continue to move across the Minnesota border and because the inconvenience was slight since most dairies issued their products in more than one kind of container.¹⁰³ The legitimate ecological benefit to the state, however, was also slight as shown by the decisions of the state courts based on the sharply contrasting evidence that disputed even a rational relationship between the mechanics of the legislation and its purpose.¹⁰⁴

The relatively equal lack of burden and benefit discussed above did not, of course, satisfy the requirement that the burden be "clearly ex-

95. *Raymond Motor*, 434 U.S. at 441.

96. 449 U.S. 456 (1981).

97. *Id.* at 475 (Powell, J., concurring and dissenting).

98. *Id.* at 467.

99. *Id.* at 458.

100. *Id.* at 470.

101. *Id.* at 472.

102. *Id.* at 471-72.

103. *Id.* at 472.

104. *Id.* at 464. An impermissible substitution of the court's judgment for that of the Legislature caused the reversal, not an erroneous finding of fact. *Id.* at 469.

cessive in relation to the putative local benefits,"¹⁰⁵ however, the Court also permitted favoritism toward the Minnesota pulp wood industry at the expense of the out-of-state plastics producers.¹⁰⁶ The legislation accomplished little for the stated purpose of environmental protection since environmentally undesirable paperboard containers were not discouraged at all.¹⁰⁷ Although the Minnesota law only slightly affected the dairy industry, the law clearly favored a major Minnesota industry, the manufacture of pulp wood, over the entirely out-of-state plastics industry.¹⁰⁸ Nevertheless, the Court re-emphasized that the burden must be "clearly excessive," and "in the light of the substantial state interest . . ." the Court upheld this burden despite the preference for a local concern.¹⁰⁹ In *Clover Leaf*, the deference to legislative purpose equaled that used in the Equal Protection rational relation analysis,¹¹⁰ and the Court refrained from vigorously analyzing the Legislative means as well as ends.¹¹¹

The unusual deference for legislative purpose in *Clover Leaf* has not been narrowed or expanded by subsequent Supreme Court cases,¹¹² and the reasons for upholding the E.S.A. compel at least the same respect as those offered on behalf of the Minnesota statute.¹¹³ Furthermore, the means chosen to enforce the social responsibility of the employment relationship are more likely to achieve that end. To forbid the use of one environmentally undesirable product while allowing another to flourish may achieve some measure of environmental protection,¹¹⁴ but the E.S.A.'s re-routing of money to the employees and twelve month notice requirement will produce a direct effect on business dislocations because such restrictions will make closing the last option of management.¹¹⁵ In addition, no favoritism for local industry lurks on the fringes of the E.S.A.,¹¹⁶ so those bearing the burden of complying with the E.S.A. can lobby against it and vote their displeasure. This political check should invite less judicial scrutiny since the

105. *Id.* at 472.

106. *Id.* at 473.

107. *Id.* at 466.

108. *Id.* at 473.

109. *Id.*

110. *Id.*

111. *But see, City of Philadelphia*, 437 U.S. at 626.

112. See Reznick, *The Constitutionality of Business Regulation in the Burger Court: Revival and Restraint*, 33 HASTINGS L. J. 1, 82 (1981).

113. See *infra* notes 125-127 and accompanying text.

114. See *Clover Leaf*, 449 U.S. at 469.

115. While a mere rational relation between the Minnesota statute's ends and means was at issue in *Clover Leaf*, a criticism of legislation like the E.S.A. is that it will tie down businesses in California. See Arnold, *supra* note 2, at 234. Thus, the former statute was criticized for being ineffective, and the latter for being too effective.

116. Local businesses are the loudest critics of the E.S.A., see Sacramento Bee, Aug. 5, 1982, at 5, cols. 1-2.

regulated businesses can take political action instead of having to rely solely on the court for relief.¹¹⁷ The combination of a lesser need for judicial scrutiny¹¹⁸ and a more effective means of achieving important legislative goals¹¹⁹ should outweigh the correspondingly increased burdens inherent in the E.S.A.¹²⁰ Although the scales should be tipped in favor of the E.S.A. in the current Commerce Clause balancing test, there remains the question of whether there is a less burdensome alternative.

As an alternative to similar legislation proposed in Ohio,¹²¹ one writer suggested that an additional payroll tax be levied on employers and put into a fund for reparations in the event of a dislocation because the taxing scheme would interfere less with the freedom of a business to move.¹²² This tax could provide monetary relief for those employees who are displaced in years hence; however, the tax would do nothing for the workers displaced now. The E.S.A. attempts to remedy a current unemployment problem in California;¹²³ furthermore, there is nothing to stop companies from beginning similar in-house tax programs voluntarily in order to accumulate funds for compliance with the E.S.A.

More importantly, the E.S.A. purports to foster responsibility by the employer for the worker and, as a necessary byproduct, to discourage relocation and make it the last option.¹²⁴ Providing workers with severance pay alleviates the employees' problems temporarily, but, as the author of the suggestion admits, this remedy treats only the symptom and ignores the disease.¹²⁵ The E.S.A. promotes planning to prevent unemployment "because this planning is fundamental to the social responsibility of the employment relationship."¹²⁶ Severance pay is important to the worker, but so are notice, the chance for re-employment, and information about alternatives for the unemployed. A less burdensome plan should accomplish the same goals of the plan under attack before the court strikes the latter down.¹²⁷ Since the reduction of mobility is inherently incidental to the social responsibility fostered by the

117. See *Raymond Motor*, 434 U.S. at 447; Reznick, *supra* note 112, at 80.

118. See *supra* notes 116-117 and accompanying text.

119. See *supra* notes 114-115 and accompanying text.

120. See *supra* notes 33-62, 115 and accompanying text.

121. S.B. No. 118, 113th Ohio Gen. Ass. (1979-80); discussed in Arnold *supra*, note 2, at 232-34.

122. Arnold *supra*, note 2, at 252.

123. See *Sacramento Bee*, Aug. 7, 1982, at 1, cols. 5-6.

124. See A.B.2839, *supra* note 1, §1451(c); cf. Arnold, *supra* note 2, at 234.

125. "Employers would, however, be free to make a decision to move their entire business or portions thereof in interstate commerce. . .;" Arnold, *supra* note 2, at 252.

126. A.B.2839, *supra* note 1, §1451(c).

127. See *Clover Leaf* 449 U.S. at 473-74.

E.S.A., any solution that ignores this incidental burden does not promote the same social responsibility here being demanded of business, and should not prevail over the E.S.A.

The traditional Commerce Clause arguments against the E.S.A. presented above do not withstand careful examination. Nonetheless, as a final argument against the Commerce Clause challenge, this comment will discuss a new theory that would greatly reduce the scope of the Clause. At least one eminent scholar, Professor Eule, questions the initial assumption that comparing the relative values of different proposals, or comparing local benefits against interstate burdens, is a proper function of the court.¹²⁸ In brief, his article, *Laying the Dormant Commerce Clause To Rest*,¹²⁹ demonstrates the impropriety of a Commerce Clause challenge to the E.S.A. because its invalidation could result only from the judicial usurpation of the democratic process.¹³⁰ The framers of the Constitution intended the Commerce Clause to combat protectionism among the states, but its use to protect free trade was a judicial invention.¹³¹ The greater the burden on commerce, the more likely the court is to invalidate the statute; but, "[t]here is something fundamentally wrong with a judicial framework that prompts judicial intervention by the same trigger that induces political response."¹³² Professor Eule demonstrates that the Commerce Clause requires intervention by the court only when the democratic process is threatened by a "disproportionate" effect on outsiders.¹³³ A shift in the law in the direction mapped out by Professor Eule should encourage future proponents of the E.S.A.;¹³⁴ nevertheless, as the law stands today, the E.S.A. can clear the Commerce Clause hurdle. The argument now will turn to a constitutional obstacle recently reconstructed by the Burger Court, the Contract Clause.¹³⁵

128. See Eule, *supra* note 67, at 443.

129. 91 YALE L. J. 425 (1982).

130. *Id.* at 443.

131. *Id.* at 428.

132. *Id.* at 436.

133. *Id.* at 443, 460.

134. The E.S.A. effects predominantly California businesses, see *supra* notes 71-75 and accompanying text, so there would be no "disproportionate" effect on outsiders; therefore, intervention under the Commerce Clause would be unwarranted. See *supra* notes 129-133 and accompanying text.

135. "No State shall . . . pass any . . . law impairing the Obligation of Contracts." U.S. CONST. art. I, §10. The Contract Clause was reconstructed in *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 241-44, 250-51 (1978).

THE NEW OBLIGATIONS IMPOSED ON BUSINESS BY THE
EMPLOYMENT STABILIZATION ACT ARE SUBJECT TO THE
CONTRACT CLAUSE

The same E.S.A. provisions that attract Commerce Clause scrutiny, that is notice and hiring preference or severance pay, also raise suspicion under the Contract Clause as recently interpreted by the Supreme Court.¹³⁶ In the seminal case, *Allied Structural Steel v. Spannaus*,¹³⁷ the majority of the Supreme Court invalidated the Minnesota Private Pension Benefits Protection Act (hereinafter referred to as the Pension Act) which significantly increased the existing pension plan duties of employers.¹³⁸ As discussed previously, the E.S.A. saddles employers with many new responsibilities which exceed their current contractual obligations.¹³⁹ While the Contract Clause speaks of "impairing" obligations, thereby implying the dilution or nullification of previous duties, the plain meaning of impairment is not reliable after *Allied*.¹⁴⁰ As a result, any positive social legislation that affects contractual obligations will be subject to judicial evaluation since the shifting of responsibilities among parties under contract necessarily places additional burdens on one of them.¹⁴¹ This broad approach significantly increases the risk of judicial abuse of discretion under Contract Clause inquiry.¹⁴²

Under the *Allied* analysis, the more serious the legislative attempt to alter the status quo for the benefit of the less privileged, the closer the court will look to invalidate the scheme since "the severity of the impairment measures the height of the hurdle the state legislature must clear."¹⁴³ The Contract Clause, therefore, will be a major part of the business community's defense when California businesses try to reject the burden transplanted from the workers in business dislocations. Although the E.S.A. interferes at least as much with employment contracts as did the stricken Pension Act in *Allied*,¹⁴⁴ significant distinctions between them will be shown which should permit the E.S.A. to avoid the Contract Clause obstacle despite the enlarged boundaries of that clause.

136. See *supra* notes 63-65 and accompanying text.

137. 438 U.S. 234 (1978).

138. See *id.* at 238, 250-51.

139. See *supra* notes 33-62 and accompanying text.

140. 438 U.S. at 258 (Brennan J., dissenting).

141. See *id.* at 252.

142. Reznick, *supra* note 112, at 31.

143. 438 U.S. at 245.

144. Compare the provisions of the E.S.A. set out in *supra* notes 33-62 and accompanying text, with the terms of the Pension Act in *Allied Structural Steel*, 438 U.S. at 236-40.

A. The Scope of the Economic Conditions Confronted by the Employment Stabilization Act

One of the major flaws of the Pension Act perceived by the *Allied* majority was that the disruption of contractual expectations was not "necessary to meet an important general social problem."¹⁴⁵ The Minnesota Legislature knew that the Pension Act would soon be superseded by federal legislation¹⁴⁶ and placed little evidence of legislative intent in the record; so, the "presumption favoring 'legislative judgment as to the necessity and reasonableness of a particular measure'" could not be upheld.¹⁴⁷ Although the *Allied* majority did not state the specific social evil addressed by the Pension Act, Justice Brennan's dissent indicated that it was an interim measure to avoid the frustration of employee expectations caused by plant closures before the workers' rights in their pension plan had become vested.¹⁴⁸ The majority did not believe the Pension Act confronted a situation "remotely approaching the broad and disparate emergency economic conditions of the early 1930's—conditions of which the Court in *Blaisdell* took judicial notice."¹⁴⁹

The analogy to the depression era need for social legislation is more apt now than it was in 1978 when *Allied* was decided because the current national unemployment rate is higher than it has been in the last forty years.¹⁵⁰ The economic situation may not be as desperate today in California as it was in Arkansas in the *Blaisdell* era, but the Contract Clause does not require an "emergency of great magnitude to justify state law."¹⁵¹ The widespread unemployment, which prompted the drafting of the E.S.A.,¹⁵² should permit a greater impairment of contract¹⁵³ than did the less severe problem confronting the Minnesota Legislature.¹⁵⁴ A related factor that influenced the Court to invalidate the Pension Act was its limited coverage.¹⁵⁵

145. 438 U.S. at 247.

146. *Id.* at 247 n.21.

147. *Id.* at 247.

148. *Id.* at 252. The Pension Act also dealt with the termination of entire pension plans. *Id.* at 252 n.1.

149. *Id.* at 249. The Court's reference is to *Home Building and Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

150. *Sacramento Bee*, Aug. 7, 1982, at 1, cols. 5-6.

151. 438 U.S. at 249 n.24.

152. See A.B.2839, *supra* note 1, §1451(a). Compare *id.* with *Sacramento Bee*, Aug. 7, 1982, at 1, cols. 5-6; and *id.* Aug. 5, 1982, at 5, cols. 1-2.

153. See *supra* note 143 and accompanying text.

154. See 438 U.S. at 247.

155. See *infra* notes 156-171 and accompanying text.

B. The Coverage of the Employment Stabilization Act

The Court looks to the scope of an act to see if the regulations could be an adequate response to the social problem.¹⁵⁶ The law must be "enacted to protect a broad societal interest rather than a narrow class."¹⁵⁷ The Pension Act applied to private employers who employed 100 workers or more and had established a voluntary pension plan that qualified under section 401 of the Internal Revenue Code, but only if the employer closed a Minnesota office or terminated the pension plan.¹⁵⁸ This narrow aim, combined with the severe, retroactive, and permanent alteration¹⁵⁹ of a vital term of the contract,¹⁶⁰ distinguished the Minnesota Act from those that had previously been upheld under the Contract Clause.¹⁶¹

The E.S.A., however, protects a much broader class of persons than did the Pension Act. Although the E.S.A.'s threshold requirement of 300 or more employees, or 50 or more at a single work place in California if the company employs more than 2,000 nationwide,¹⁶² is higher, the E.S.A. applies to all employees of qualified private businesses¹⁶³ who have worked 13 out of the previous 52 weeks¹⁶⁴ rather than those who have worked for ten or more years.¹⁶⁵ In contrast with the Pension Act, which protected workers only where voluntary pension plans had been established,¹⁶⁶ the E.S.A. regulates businesses that have *not* covered business dislocation in a collective bargaining agreement.¹⁶⁷ The exclusion of businesses that agree on terms of closure in collective bargaining ensures that virtually all large private employers in California will look after the interests of their dismissed employees more carefully. The E.S.A. controls non-union businesses and could influence bargaining strategy of unionized businesses since the absence of a collective bargaining agreement on plant closures will result in the application of the E.S.A.¹⁶⁸ Furthermore, the E.S.A. is triggered by a reduction of 25 percent of the work force or 15 employees, whichever is more,¹⁶⁹ not by the closure of an entire work place or discarding of the

156. 438 U.S. at 249.

157. *Id.*

158. *Id.* at 248.

159. *Id.* at 250.

160. *Id.* at 246.

161. *Id.* at 250.

162. A.B.2839, *supra* note 1, §1452(c).

163. *Id.* §1453(b).

164. *Id.* §1452(a).

165. 438 U.S. at 246.

166. *Id.* at 248.

167. A.B.2839, *supra* note 1, §1452(c).

168. See *supra* notes 36-37 and accompanying text.

169. A.B.2839, *supra* note 1, §1451(f).

pension plan.¹⁷⁰

Thus, due to the nature of the problems in California and the breadth of the Legislature's response, two of the major criticisms of the Pension Act cannot be leveled at the E.S.A.,¹⁷¹ however, the E.S.A. is a target for others. As will be demonstrated, these additional criticisms should not be sufficient in themselves to strike the E.S.A. under the Contract Clause.

C. *Defects in the Employment Stabilization Act Under the Contract Clause*

A flaw common to both the Pension Act and the E.S.A. is that they are not limited to the duration of the crisis.¹⁷² The *Allied* majority relies on *Home Building and Loan Association v. Blaisdell*¹⁷³ where a mortgage moratorium was enacted to provide relief for homeowners threatened with foreclosure, but the relief was limited to the duration of the emergency.¹⁷⁴ As the *Allied* dissent points out, *Blaisdell* involved the suspension by state of the homeowner's obligation rather than the addition of a new one.¹⁷⁵ Since suspension of obligations posed the harm that the framers intended to quash with the Contract Clause,¹⁷⁶ the need for suspended obligations to be temporary is more pronounced. Legislation effecting social change will rarely be limited to a certain time frame¹⁷⁷ because a reversion to the previous state of affairs would be counter-productive. The *Blaisdell* legislation merely provided temporary relief so that people did not go homeless; it is completely dissimilar to legislation that attacks the reasons why people go homeless.¹⁷⁸ The latter acts as preventative medicine that necessarily must be continuous, but the former merely attempts to cure an existing wound and becomes superfluous after the sore heals. The majority in *Allied* did not think that the Pension Act was as preventative as it was punitive,¹⁷⁹ hence the lack of a termination date rendered the legislation inappropriate for its narrow purpose.¹⁸⁰ Therefore, it is not clear preventative legislation like the E.S.A. must be temporary despite the use of that criterion by the majority in *Allied*.

170. 438 U.S. at 248.

171. See *supra* notes 145-170 and accompanying text.

172. 438 U.S. at 250.

173. 290 U.S. 398 (1934).

174. 438 U.S. at 242.

175. *Id.* at 256.

176. *Id.*

177. *Id.* at 261.

178. *Id.* at 242.

179. *Id.* at 248, 250.

180. See *id.* at 250.

Another charge that can be levelled against both Acts is that the Legislature has entered a field never before regulated.¹⁸¹ The *Allied* dissent recognized that the court can easily manipulate this factor because the field can be viewed broadly or narrowly.¹⁸² The California Legislature has been concerned with increased employer responsibility to the worker for some time, and has enacted worker's compensation¹⁸³ and other laws to increase employer responsiveness,¹⁸⁴ however, it has never previously restricted business movement as would the E.S.A.¹⁸⁵

Assuming that this field is considered completely new in California, legislating in virgin territory cannot by itself cause a Contract Clause violation or the Legislature would be handcuffed. Entering a new field,¹⁸⁶ retroactive effect,¹⁸⁷ and permanence¹⁸⁸ enlarge the impairment that must be justified because they increase the disruption of contract-based expectations.¹⁸⁹ Broad social reform under the state's police power is "paramount to any rights under contract between individuals;"¹⁹⁰ nevertheless, where the statute causes a severe impairment by the aforementioned means, the Legislature loses the presumption of "necessity and reasonableness of a particular measure."¹⁹¹ Although the Pension Act did not withstand the strenuous judicial examination of legislative purpose and the means chosen to achieve it, the California Legislature can better demonstrate important social reasons to justify a severe impairment caused by legislation like the E.S.A.¹⁹²

Moreover, the issue of retroactive effect is not as strong here as in *Allied* because the E.S.A. does not provide for those already unemployed, but will act prospectively after enactment.¹⁹³ Of course, the dissent in *Allied* did not believe the Minnesota statute acted retrospectively either,¹⁹⁴ and the real concern of the majority appears to be the lack of a grace period or gradual applicability.¹⁹⁵ A grace period

181. *Id.* at 249.

182. *Id.* at 261 n.8.

183. CAL. LAB. CODE §§3200-6002.

184. See generally *id.* §§1771-1798; *id.* §§1410-1433. These sections regulate work conditions, wages, and hours for women and minors, and fair employment practices.

185. See Assembly Labor & Employment Committee Report, bill no. 2839, hearing date Apr. 13, 1982, at 1.

186. See *supra* notes 181-185 and accompanying text.

187. See *infra* notes 193-197 and accompanying text.

188. See *supra* notes 145-154 and accompanying text.

189. See *Allied Structural Steel*, 438 U.S. at 247, 249, 250.

190. *Id.* at 241.

191. *Id.* at 247.

192. See *supra* notes 145-171 and accompanying text.

193. See A.B.2839, *supra* note 1, §1452(c), (f). Although §1452(c) refers to the preceeding 12 months to determine the size of the company, section 1452(f) does not act retrospectively to determine a reduction in operations to trigger the E.S.A.

194. See *Allied Structural Steel*, 438 U.S. at 255.

195. *Id.* at 247.

would not be appropriate for legislation enacted to relieve an immediate problem. As mentioned before, the E.S.A. attempts to prevent future disproportionate hardships to workers,¹⁹⁶ but it also responds to the immediate crisis which prompted its drafting;¹⁹⁷ therefore, the type of solution justifies its permanence and the type of problem justifies its immediacy. In *Allied*, neither the problem nor the solution were significant enough, according to the majority, to allow Minnesota to do constitutionally "what it tried to do to the company. . . ."¹⁹⁸ Although legislation like the E.S.A. should stand up to the discretionary approach of the majority,¹⁹⁹ such legislation fares even better under the standards set out in the dissent.

D. *The Interpretation of the Contract Clause by the Dissent*

It should be noted at the outset that *Allied* was a five to three decision; however, the current Court stands four to three on the issue because Justice Blackman took no part in *Allied*,²⁰⁰ and Justice Stewart, who penned the majority opinion, has been replaced by Justice O'Connor. The wording of the majority opinion, moreover, leaves open the option of limiting *Allied* to its facts without greatly chagrining the Court because the majority held, "that if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case."²⁰¹ These points, plus the generally unfavorable response by legal scholars to the decision,²⁰² indicate that the minority position may prevail the next time a Contract Clause case reaches the Supreme Court.

Should the dissent prevail, the Contract Clause would have no application to the E.S.A. because of the distinction between the addition of new obligations and the nullification of existing terms of a contract.²⁰³ The E.S.A. does the former, but only the latter constitutes an impairment of contract;²⁰⁴ therefore, constitutional analysis would focus on

196. See *supra* notes 123-127 and accompanying text.

197. There are 1.3 million people out of work in California, which is 10% of the work force. Sacramento Bee, Aug. 7, 1982, at 1, cols. 5-6. This figure is above the national unemployment rate, and the national unemployment rate is higher than it has been in the last 40 years. *Id.* The E.S.A. is strongly backed by unions whose constituents are losing jobs due to plant closures. *Id.* Aug. 5, p. 5, cols. 1-2.

198. *Allied Structural Steel*, 438 U.S. at 251.

199. See *Id.* at 250-51.

200. *Id.* at 251.

201. *Id.* at 250-51.

202. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1979 Supp., 45-50); Reznick *supra* note 112, at 31; e.g. Comment, *The Contract Clause: A Constitutional Basis for Invalidating State Legislation*, 12 LOY. L.A. L. REV. 927, 955-57 (1979).

203. *Allied Structural Steel*, 438 U.S. at 255-56.

204. *Id.* at 256.

the Due Process Clause of the Fourteenth Amendment.²⁰⁵ Moreover, the *Allied* dissent contains unequivocal support for one of the more burdensome requirements of the E.S.A., saying,

The existence of the Act's duties—which are similar to a legislatively imposed requirement of severance pay measured by the length of the discharged employees' service—is simply one of a number of factors that the employer considers in making the business decision to terminate the employees who work there.²⁰⁶

Justice Brennan argues that the Contract Clause never protected contract-based expectations and that the vague majority approach vests “judges with broad subjective discretion to protect property interests that happen to appeal to them.”²⁰⁷ The inapplicability of the Contract Clause to the national government demonstrates that contractual expectations were never sacrosanct under the Constitution.²⁰⁸ Instead of promoting consistency by protecting any interference with expectation interests, the Court will reach anomalous results based on whether the “impairment” emanates from state or national sources and whether the expectation was protected by contract.²⁰⁹ There is little reason to treat property differently due to its derivation without regard to its substance.²¹⁰

Although this comment does not pretend to be able to predict which side will prevail, the tendency of the Burger Court toward moderation when evaluating economic legislation²¹¹ indicates that the majority position will not be used as broadly as the dissent fears. Under the approach of either the dissent or the majority, however, the E.S.A. should survive the Contract Clause objection.²¹² Thus, the last significant constitutional attack on the E.S.A. to be repelled is the assertion that the severity of the regulations might be a “taking without compensation.”²¹³

THE SECTIONS OF THE EMPLOYMENT STABILIZATION ACT WHICH ARE IMPLICATED BY THE TAKING CLAUSE

The E.S.A. requires twelve months notice before a planned reduction

205. Although beyond the scope of this comment, there is little reason to suspect that the Employment Stabilization Act will fail the looser rational relation test of Due Process for social and economic legislation. *Id.* at 263.

206. *Id.* at 254-55.

207. *Id.* at 261.

208. *Id.* at 259.

209. *Id.* at 259, 262.

210. Comment, *supra* note 202, at 956-57.

211. Reznick, *supra* note 112, at 10.

212. See *supra* notes 136-211 and accompanying text.

213. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

of operations.²¹⁴ In situations where a company determines that it must shut down within a year or it will suffer losses, the company will be compelled to operate at a loss during the lag between the shut down date and the running of the notice. It is suggested that this restriction on the use of the property may result in a taking of private property for public use without just compensation as prohibited by the Fifth Amendment and applied to the states through the Fourteenth Amendment.²¹⁵ This section will demonstrate that the twelve month notice requirement does not involve a taking under the current Supreme Court analysis. Further, an alternative approach will be suggested that should balance the needs of the employers and the workers more evenly and avoid the question of a taking altogether. This analysis will begin by ascertaining who should bear the cost imposed by the regulations.

A. Who Should Bear the Burden of this Reform?

It cannot be disputed that the notice requirement destroys some property rights since those rights address a citizen's interest in the possession, use, and disposal of his property²¹⁶ and since the ability to dispose of the property is limited for up to a year. Therefore, the real controversy concerns whether this destruction of a property right is a taking, a much more difficult problem to solve due to the dearth of settled principles.²¹⁷ The United States Supreme Court freely admits to providing little assistance, saying, "[t]here is no abstract or fixed point at which judicial intervention under the Taking Clause becomes appropriate . . . [r]esolution of each case, . . . ultimately calls as much for the exercise of judgment as for the application of logic."²¹⁸ Certain factors, nevertheless, clearly influence the Court when it considers the extent of the restrictions on property which will be tolerated without requiring compensation.

One factor the Supreme Court considers is the character of the governmental intrusion.²¹⁹ A physical invasion generally interferes more than the rules of a "public problem adjusting the benefits and burdens of economic life to promote the common good."²²⁰ Yet, an emergency sacrifice of private property for the preservation of property more valu-

214. A.B. 2839, *supra* note 1, §1460(b).

215. Arnold, *supra* note 2, at 247.

216. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 142-43 (1978) (Rehnquist, J., dissenting).

217. *Andrus v. Allard*, 444 U.S. 51, 56 (1979).

218. *Id.*

219. *Penn Central Transportation*, 438 U.S. at 124.

220. *Id.*

able to the public is not a taking²²¹ because the owner has no right to property that endangers the general welfare.²²² As a practical matter, government cannot function if it must compensate property owners every time their holdings are devalued because of changes in the law.²²³ Regulations are less likely to destroy the present use of the property than physical invasion; however, this turns on the extent of the interference with the property as a whole.²²⁴

Evaluating the extent of the interference is the second and more difficult component of the taking issue. While diminution in value alone cannot establish a taking,²²⁵ the interference cannot be so severe as to constitute an act of eminent domain requiring compensation to sustain it.²²⁶ To challenge successfully the statute the plaintiffs must show that it almost completely destroys the value of the property.²²⁷ Even though the venture may be forced to continue at a loss, the notice requirement of the E.S.A. may not completely destroy the value of a business because the compulsion can last no longer than twelve months. In *Pennsylvania Coal Co. v. Mahon*,²²⁸ the regulations were found to be a taking because they prohibited, in practical effect, a reasonable return on the owners' investment-based expectations;²²⁹ the E.S.A., however, merely delays rather than prohibits the return on an investment.²³⁰ Furthermore, creativity by management can reduce the impact of the short term loss by putting the employees to work in different ways. For example, rather than continuing production when there is no need, managers could reassign workers to maintenance projects to improve the plant for the time when production needs rise again, or to increase the value should the owner wish to sell.²³¹

The denial of the owner's prerogative to shut down a plant or of any other traditional property right, does not necessarily amount to a taking. Where the owner "possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."²³² In *Andrus v. Allard*,²³³ the owners were prohibited from selling bald eagle feathers that were ob-

221. *Id.* at 126.

222. See TRIBE, *supra* note 202, at 463-64.

223. *Penn Central Transportation*, 438 U.S. at 124.

224. *Id.* at 130-31.

225. *Id.* at 131.

226. *Id.* at 136.

227. See Reznick, *supra* note 112, at 24.

228. 260 U.S. 393 (1922).

229. *Penn Central Transportation*, 438 U.S. at 127 (analyzing *Pennsylvania Coal*, 260 U.S. 393).

230. See A.B.2839, *supra* note 1, §1460(b).

231. See Range, *supra* note 86, at 80.

232. *Andrus v. Allard*, 444 U.S. 66 (1979).

233. 444 U.S. at 51.

tained before the ban on trafficking in rare bird parts was imposed,²³⁴ but the court deemed it crucial that the appellees retained their rights to possess, transport, donate, or devise their property.²³⁵ The E.S.A. bars no right, but limits the right to transport or close a facility while leaving possession, sale, donation, or devise of the property within the owner's discretion.²³⁶ Certainly, the inability to sell property reduces its value as much as the inability to dispose of it immediately, and must frustrate the investment-backed expectation of a reasonable return even more because there is no time limitation on the restriction. The Court in *Andrus* says that, "the loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking's claim."²³⁷ Although the Court suggests that the ban on the sale does not make the property entirely useless commercially because the owners may be able to display the feathers and charge for admission,²³⁸ a more plausible explanation for the decision lies in the fundamental question of who should bear the losses caused by the desired changes.²³⁹

There seem to be two criteria that are weighed according to the facts of each case to determine who should bear the cost, though the Court has not explicitly addressed either of them. The first seeks to determine who is responsible for prompting the legislation, or if no one, who benefits most from the legislation.²⁴⁰ The second focuses on who is the best cost spreader.²⁴¹ The second criterion was by implication a factor in *Penn. Central Transportation Co. v. New York*,²⁴² and carried more weight than the first because no one was at fault for the expense inher-

234. *Id.* at 54.

235. *Id.* at 66.

236. Of course, the E.S.A. could hamper attempts to sell due to the 12 month notice requirement and the severance fee etc. See *supra* notes 33-62 and accompanying text.

237. *Andrus*, 444 U.S. at 66.

238. *Id.*

239. *Pennsylvania Coal*, 260 U.S. at 416.

240. The first criteria is a combination of rationales posited by Professor Tribe for two types of taking cases: where the government acts to redistribute wealth, and where property is taken because its former use was immoral or otherwise unacceptable. The rationale for the former taking is that the owners had more than their rightful share in the first place. The latter is explained by the fact that the owner had no right to continue using the property in such a manner. *TRIBE, supra* note 202, at 463-464. Where no one is responsible for conditions causing the regulations, such as where historical buildings are protected by zoning, the Court looks to see if those in the community benefit more than the property holder who must conform. See *Penn. Central Transportation*, at 132-33. See *infra* note 244 and accompanying text.

241. The second criteria is from the rationale suggested by Professor Tribe for a third type of taking case: government reallocating property to generate more of some desired benefit, or less of a disliked detriment. The rationale is procedural rather than substantive and rests on the proposition that it would cost more to administer a system of compensation for those burdened than the compensation would be worth in the long run. *TRIBE, supra* note 202, at 463-64; see *Penn. Central*, at 152.

242. 438 U.S. 104, 148, 151 (1978) (Rehnquist, J., dissenting).

ent in preserving historical landmarks.²⁴³ The benefit inured to all of the citizens of New York evenly. Despite some property owners being burdened more than other property owners, the mutual benefit received through the enhancement of the entire community justifies the individual cost in such land use restriction cases.²⁴⁴

The first factor weighed much more heavily in *Andrus* than in *Penn. Central* because those who sell feathers undoubtedly contribute more heavily than the general public to the demise of the protected birds which previously wore them. Even though the plaintiffs had obtained the feathers prior to the passage of the legislation banning the sale of feathers, their sale would encourage others to try to circumvent the law.²⁴⁵ The Court dismissed the argument that the sellers should not have to bear the cost of those regulations saying, "within limits, that is a burden borne to secure the advantage of living and doing business in a civilized community."²⁴⁶ In situations where the owner creates the wrong, the law redresses the previous imbalance through regulations burdening those responsible instead of the general public.²⁴⁷

The same rationale explains the *Pennsylvania Coal* result as well. The public bought only surface rights, leaving the underground mineral rights to the mining operation.²⁴⁸ Soon afterward, the state legislature passed a law prohibiting mining within 150 feet of a residence, thus destroying the value of the underground mineral rights.²⁴⁹ The majority of the Court believed that the public created the risk to the housing by choosing to buy only the surface rights; therefore, the public should pay the price of acquiring greater security.²⁵⁰

Both criteria support the attempt by the California Legislature to place the burden of providing notice on the employers. To begin with, legislative judgment carries with it a rebuttable presumption of constitutionality under the Taking Clause.²⁵¹ The E.S.A. is based on the legislative judgment that the responsibilities of the employer in an employment relationship extend beyond the work place.²⁵² The responsibilities include acting to minimize or avoid the hardships to the worker and the community caused by layoffs.²⁵³ The reason for plac-

243. *Id.* at 134-35.

244. *Id.* at 132-33.

245. *Andrus*, 444 U.S. at 58-9.

246. *Id.* at 67.

247. *TRIBE*, *supra* note 202, at 463-64.

248. *Pennsylvania Coal*, 260 U.S. at 412.

249. *Id.* at 412-13.

250. *See id.* at 416.

251. *See id.* at 413; *Reznick*, *supra* note 112, at 19.

252. *See* A.B.2839, *supra* note 1, §1451(d).

253. *Id.*

ing the responsibility on private enterprise is that the closing of large plants exacts a social price that goes uncharged to those who make the decision.²⁵⁴ In other words, since companies create the risk of displacing large numbers of workers, it is only fair that they should bear part of the cost caused by law enacted to alleviate that risk. Therefore, the E.S.A. does not contravene the basic prohibition of the Taking Clause, that is, that the interests of the few cannot *arbitrarily* be sacrificed for the many.²⁵⁵ In addition, the cost may be spread more efficiently by companies treating the potential delay in moving as another business expense to calculate before deciding to close, than by adding a greater burden to the taxpayers for less efficient government spending.

Although the restriction on property caused by the E.S.A. should not be deemed excessive, and businesses are properly saddled with the burden, the current case by case approach leaves controversies in doubt until the decision is rendered.²⁵⁶ A more certain way for the Legislature to avoid the problem would be to modify the notice requirement.

B. A Proposed Modification of the Notice Requirement

The E.S.A. already includes a limited escape clause which allows companies to provide notice after the fact when the closure of a business is a surprise.²⁵⁷ The disparity of treatment between those who qualify²⁵⁸ for this narrow exception and the unequivocal twelve month notice requirement for everyone else effectively protects workers' interests, but may not adequately account for management's need for flexibility.²⁵⁹ The cost of moving or closing under the E.S.A. will do much to preserve workers' jobs even without the twelve month guarantee because businesses will not close until it is clearly more economically painful to remain open.²⁶⁰ Furthermore, the choice of new work or severance pay²⁶¹ will buy time for workers to search for new employment.

Therefore, the goal of the notice requirement should be to avoid deceptive practices by management at the workers' expense rather than simply to provide a lengthy blanket notice period. Whatever the prospective business advantages of closing without notice are, they must be

254. Arnold, *supra* note 2, at 233-34.

255. TRIBE, *supra* note 202, at 463-64.

256. See *Andrus*, 444 U.S. at 65.

257. A.B.2839, *supra* note 1, §1460(c).

258. See *supra* notes 49-51 and accompanying text.

259. See Arnold, *supra* note 2, at 232-34.

260. *Id.* at 234.

261. Accepting the work would obviate the need to look for new employment, and the severance pay would help support the unemployed while between jobs. See *supra* notes 55-59 and accompanying text.

tempered by fair play in regard to employees and the community. To require companies to send notice when the decision is made, rather than demanding clairvoyance by management, sufficiently vindicates the principle of fairness.

The legislative choice of twelve months notice can be justified as a way to avoid the manipulation by businesses of a flexible standard like the one proposed above. The United States Supreme Court upheld a similar argument for blanket coverage under an act in *Andrus*.²⁶² Nevertheless, the problem of enforcing the flexible standard is not appreciably more difficult than enforcing the current exception because in the latter, the D.I.R. must detect businesses that claim to be surprised in order to escape from the advance notice requirement.²⁶³ The E.S.A. compels businesses to submit their financial and operating records for the investigative and planning activity conducted by the D.I.R., pursuant to its duty to find alternatives to closing or ways to cushion its impact,²⁶⁴ but the records can also be used to check the appropriateness of very short notice given by companies claiming recent economic developments. Unless the enforcement problems are practically insurmountable, requiring notice concurrent with the decision to reduce operations is preferable to the twelve month notice because the former avoids the taking issue altogether,²⁶⁵ and reaches a more equitable accommodation of competing interests. To guarantee workers some time to brace for unemployment without slowing business decisions drastically, a minimum of three months notice before closure may be a desirable addition to notice concurrent with the decision to reduce operations. Regardless of which approach to the notice requirement is adopted by subsequent proponents of the E.S.A., those supporters should not be intimidated by speculation about the unconstitutionality under the Taking Clause of making businesses attend to their social responsibility.

CONCLUSION

Although certainly a close question, the E.S.A. should not succumb to challenges under the Commerce Clause, Contract Clause, or Taking Clause. The E.S.A. does not fall under the Commerce Clause first be-

262. *Andrus*, 444 U.S. at 58-9.

263. A.B.2839, *supra* note 1, §1470.

264. *Id.* §1463.

265. The taking issue would be avoided because businesses would not have to wait for a notice period to run unless they neglected to provide notice when the determination to shutdown was made. Therefore, they would not be compelled to operate at a loss for more than three months (or whatever minimum time is set). This shorter period would not be significant enough to be a taking. See Arnold, *supra* note 2, at 251.

cause the restrictions on businesses are not discriminatory.²⁶⁶ California enterprises bear the burden of the statute, and competitors are not discouraged.²⁶⁷ Furthermore, the burden should not be deemed "clearly excessive in relation to the putative local benefits" because of the magnitude of the problems the E.S.A. confronts.²⁶⁸ Alternative means of coping with the problem of business dislocations that merely raise money in a less obtrusive manner are not viable because they ignore a major component of the E.S.A., that is, the intent to make closure the last choice of struggling management.²⁶⁹ Finally, the lack of a disproportionate affect on out-of-state businesses may render Commerce Clause scrutiny inappropriate since the controversy can be resolved through the political process.²⁷⁰

Under the current test used by the United States Supreme Court, examining the E.S.A. under the Contract Clause may also be inappropriate because of distinctions between the E.S.A. and the Pension Act in *Allied* which indicate that the former should not fail.²⁷¹ The E.S.A. combats a larger social problem and benefits a larger class of people than did the stricken Pension Act.²⁷² These two advantages of the E.S.A. obviate the possible flaws of no phase-in period, no termination date, and no previous history of regulation in the area because their application would contradict the wide ranging effect of legislation of this type.²⁷³

Furthermore, the majority approach in *Allied* may not extend beyond that case.²⁷⁴ Should the dissenting view prevail, the Contract Clause would not play any part in the dispute over the E.S.A. because the additional burdens contained therein would not be considered impairments of contract.²⁷⁵ To impair a contract according to the dissent, the legislation must suspend or nullify an existing term of the contract, therefore, upsetting expectation interests would be insufficient to raise the Contract Clause objection.²⁷⁶

In contrast with the clear majority and dissent approaches available under the Contract Clause, the Court has not delineated a settled method to use in Taking Clause cases.²⁷⁷ Nevertheless, legislation like

266. See *supra* notes 67-75 and accompanying text.

267. *Id.*

268. *Raymond Motor*, 434 U.S. at 441. See *supra* notes 95-120 and accompanying text.

269. See *supra* notes 121-127 and accompanying text.

270. See *supra* notes 128-133 and accompanying text.

271. See *supra* notes 145-212 and accompanying text.

272. See *supra* notes 145-170 and accompanying text.

273. See *supra* notes 172-198 and accompanying text.

274. See *supra* notes 200-202 and accompanying text.

275. See *supra* notes 203-230 and accompanying text.

276. See *supra* notes 203-230 and accompanying text.

277. See *supra* notes 217-218 and accompanying text.

the E.S.A. should not be defeated by Taking Clause arguments because the circumstances prompting its enactment point to businesses as the entities that, in all fairness, should bear the cost of the regulations.²⁷⁸ The burdens imposed by the E.S.A., moreover, are not excessive interferences with property that require compensation.²⁷⁹ Although the twelve month notice requirement is not an excessive interference with property, the notice requirement could be altered to allow businesses more flexibility and still protect their workers from unfair manipulation. To require notice concurrent with the decision to reduce operations with a three month minimum period would balance more equitably the competing interests, and reduce the threat of a Taking Clause argument.²⁸⁰

Therefore, the only reasons to reduce the proposed burdens on businesses lie in the realms of economics and politics, both of which are left for others to debate. The E.S.A. died in the California Assembly this year; however, the principles for which it stands are likely to be resurrected until they eventually are accepted.²⁸¹ The magnitude of the problem, the lack of accountability by big businesses, and the unwillingness of Californians to undertake additional tax burdens leave no more suitable alternative than to force companies to lend a hand; unfortunately, the loud trumpeting of frightened businesses currently overwhelms the mild voice of reason, and may do so for some time.²⁸² This comment does not oppose a national solution to the problem, and some have been proposed,²⁸³ nevertheless, in the absense of a foreseeable Congressional response, the states should take it upon themselves to pass appropriate measures.

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278. *See supra* notes 239-255 and accompanying text.

279. *See supra* notes 225-238 and accompanying text.

280. *See supra* notes 257-265 and accompanying text.

281. *See supra* notes 30-32 and accompanying text.

282. *See Sacramento Bee*, Aug. 5, 1982, at 5, cols. 1-2.

283. *See Arnold, supra* note 2, at 229-30.